SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-924

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY, *Petitioners,*

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Sears, Roebuck and Co. ("Sears") and Terminal Freight Handling Cooperative Association and Terminal Freight Handling Company ("Terminal"), charging parties before the National Labor Relations Board, seek a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit. The court below affirmed the decision of the District Court that it lacked subject matter jurisdiction to enjoin a Board regional director, as agent for the General Counsel of the Board, from negotiating a settlement agreement of Petitioners'

unfair labor practice charges while, at the same time, refusing to allow Petitioners to meaningfully participate in such negotiations.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at — F.2d —, 79 LRRM 2710 and is printed at App. 1a. The judgment of that Court is printed at App. 9a. The oral opinion of the District Court is unreported; that Court's order of dismissal is printed at App. 7a. Petitioners' appeal to the General Counsel from the Respondent Regional Director's denial of their request to participate in the settlement negotiations of their charges, and the General Counsel's final administrative affirmance of that denial are printed at App. 9a and App. 10a, respectively.

JURISDICTION

The opinion and judgment of the court below from which Petitioners seek review were entered on November 3, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, notwithstanding the final authority in respect to the issuance and prosecution of unfair labor practice cases granted the General Counsel of the National Labor Relations Board by Section 3(d) of the National Labor Relations Act, the decisions of the General Counsel as to the procedures to be followed in the settlement of cases may nevertheless be reviewed by the Board itself.

2. Whether the final administrative decision of the General Counsel of the National Labor Relations Board as to the procedures to be followed in the settlement of cases may be reviewed in an equity suit in a federal district court.

3. Whether the General Counsel of the National Labor Relations Board may exclude charging parties before the Board from meaningful participation in the settlement of their cases.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*), the Administrative Procedure Act (80 Stat. 381, 5 U.S.C. § 551, *et seq.*) and 28 U.S.C. §§ 1337 and 1361 are set forth in App. 15a-21a.

STATEMENT OF THE CASE

On June 9 and 10, 1970, Miscellaneous Drivers and Helpers Union, Local No. 610, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union") commenced picketing various retail stores and warehouses of Sears and Terminal,[1] as part of a dispute with another employer. Petitioners thereupon filed charges with Respondent Regional Director Solien ("Solien") accusing the

[1] Petitioner Terminal Freight Cooperative Association is a non-profit shippers' association consisting of about forty independent companies which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots in order to secure the advantages of lower costs through large volume shipment, and reships such goods to members' plants at locations throughout the United States. Petitioner Terminal Freight Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association at more than forty terminals throughout the United States.

Union of engaging in a secondary boycott in violation of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act (the "Act").

Although it was asserted that the Union's picketing at all the Sears and Terminal sites was unlawful, Solien initially found improper conduct at only the retail stores. A proposed informal settlement, covering merely these locations, was then tendered by Solien to Petitioners. Petitioners were provided with neither advance notification that Solien was attempting to negotiate a settlement of their charges nor an opportunity to participate in framing the terms of the settlement agreement.

Petitioners proceeded to file written objections to the proposed limited, informal settlement. They also filed a complaint in District Court to compel Solien to seek temporary injunctive relief, as required by Section 10(l) of the Act, to terminate the secondary boycott.[2] At this point, again without notice or explanation to Petitioners, Solien abruptly changed his position and declined to process further the proposed informal settlement. Instead, he issued a complaint, and filed a petition for a Section 10(l) injunction,[3] alleging the Union had engaged in a secondary boycott at not only the retail stores but *all* of the locations involved.

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[2] This action, modified after 10(l) complaint was eventually filed so as to seek a declaratory judgment as to the propriety both of Solien's initial refusal to proceed and the still-existing internal agency rule which dictated or permitted that refusal, is now pending before this Court in a closely related petition for certiorari. *Terminal Freight Handling Co., et al.* v. *Solien*, No. 71-609.

[3] The Petitioners have also recently been denied the right to independently oppose a settlement stipulation negotiated in lieu of injunctive relief. *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, — F.2d — (8th Cir. Dec. 17, 1971). A petition for certiorari from this decision is being filed concurrently herewith.

Subsequently, Petitioners once more became aware that Solien was conducting settlement discussions outside their presence. Again, Sears and Terminal requested that they be allowed to participate in the settlement negotiations of their charges and, so that such participation would be meaningful, that they be informed of the factual basis of Solien's decision to issue a broadened complaint.[4] On July 15, 1970, these requests were denied by Solien and, on appeal, by the General Counsel of the Board a week thereafter. As such denial provided for no further administrative recourse, Petitioners commenced the present action to restrain Solien from engaging in further unilateral settlement negotiations.[5] The District Court's juris-

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[4] The Petitioners' request for information was expressly confined to the type of information generally available to a charging party prior to trial. Petitioners further stressed that such information could be disclosed, if necessary, with appropriate safeguards so that there would be no improper intrusion into the government's confidential files.

[5] As Petitioners were unsuccessful in obtaining temporary relief *pendente lite*, Solien continued to engage in unilateral negotiations which eventually culminated in a proposed formal settlement. Both Sears and Terminal have filed substantive objections to this proposal including, *inter alia*, the limited nature of the remedy provided for in the settlement agreement, the inclusion of exculpatory language therein and the failure of the agreement to set forth any stipulations of facts with respect to the unfair labor practices involved. Significantly, although the former general counsel of the Board had previously overruled these objections, the present general counsel has now determined that Petitioners' objections should be considered. The basis for reconsideration was primarily an extensive study which Petitioners conducted (See footnote 19, *infra*) that demonstrated the pervasive nature of the objections and the compelling need to examine the substantive components of settlement agreements generally. This determination is significant because it demonstrates that the *Solien* cases pending before this Court, are not isolated instances but, conversely, are representative of widespread practices.

diction was premised on 5 U.S.C. §§ 702-4 and 28 U.S.C. §§ 1337 and 1361.

On July 30, 1970, the District Court dismissed the complaint for lack of subject matter jurisdiction. This decision was affirmed by the court below on November 3, 1971. App. 6a. The Eighth Circuit concluded that, "however meritorious appellant's claim may appear, it is not for us to determine this critical issue at this time. . . . appellant may still obtain administrative relief from the Board." App. 5a. This holding, in Petitioners' opinion, confuses the Board's adjudicatory right to review the substantive content of formal settlement agreements with the General Counsel's prosecutorial right to determine the procedures to be followed in arriving at a settlement. In the latter case, the General Counsel's actions are reviewable only in a district court where, as here, there has been an abuse of discretion. The decision below, accordingly, raises significant questions in the administration of our national labor law which warrant the attention of this Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Disregards the Separation of Powers Effected by Section 3(d) of the Act.

The present controversy is not only typical of secondary boycott situations, it also exemplifies settlement procedures that are uniformly applied in all unfair labor practice cases before the Board.[6] Moreover,

[6] More than 91% of all unfair labor practice charges are disposed of prior to hearing. Thus, only a small percentage of cases are ever litigated before either a trial examiner or the Board. 34th Annual Report of NLRB: Fiscal Year 1969, 1970 BNA Labor Relations Yearbook, 289, 291-3 (Bureau of National Affairs, Inc. 1971). The most significant impact on the right of charging parties, and the stage at which their deprivation is the most acute, is, accordingly, that involved in this case.

the issue involved is one that transcends in importance even this critical area. This case raises a fundamental question as to the continuing vitality of the prosecutorial-judicial dichotomy which underlies the administration of the Act.

Section 3(d) of the Act provides that the General Counsel of the Board "shall have *final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board . . ." (emphasis added). Congress intended that this provision would "effect a separation of the prosecuting and adjudicating functions within the Board." *Frito Company* v. *N.L.R.B.*, 330 F.2d 458, 462 (9th Cir. 1964). The General Counsel was to be *dominus litus;* his authority "as a prosecutor" was not to be "reviewable by the Board." *Id.* at 465.

The General Counsel's prosecutorial power must necessarily include, contrary to the decision below, the right "to consider and decide whether the public interest would be better served by settlement . . ." *Local 282 International Brotherhood of Teamsters, Warehousemen, Chauffeurs and Helpers of America* v. *N.L.R.B.*, 339 F.2d 795, 799 (2nd Cir. 1964).[7] For if,

[7] The Second Circuit in *Local 282* went on to observe that, of course, "if the settlement calls for an order, the Board, like a court presented with a consent decree, is not required to enter it." 339 F.2d at 779. This is surely the purport of Section 101.9(c)(2) of the Board's Rules (App. 20a), the controlling consideration in the view of the court below. The fact that the Board may not choose to approve a settlement on the basis of substantive objections, such as those described in Footnote 5, does not imply that the Board may control the procedures to be followed in arriving at the settlement. To use the analogy of the Second Circuit, while the Board can decide whether to enter a consent decree, it cannot control the procedural means the prosecutor may utilize in obtaining that decree.

as the Eighth Circuit presumes, the Board can dictate to the General Counsel the settlement procedures he must follow, then there has been a radical abridgement of the General Counsel's authority. By the same token, the Board would also be empowered to instruct the General Counsel as to whether to issue a complaint,[8] as to what his legal theory should be,[9] as to whether a complaint should be amended[10] or as to whether a particular settlement offer should be considered.[11] All of these matters, as well as others, would no longer be vested solely in the General Counsel. There would be, in short, a reversion to the situation which existed prior to the enactment of Section 8(d) in 1947: an amalgamation of the prosecutorial and judicial functions of the Board notwithstanding the clear Congressional intent to the contrary.[12]

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[8] Cf., e.g., *Lincourt* v. *N.L.R.B.*, 170 F.2d 306 (1st Cir. 1948).

[9] Cf., e.g., *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F.2d 575, 588 (3rd Cir. 1960), *cert. den.*, 364 U.S. 912 (1960), 364 U.S. 933 (1961).

[10] Cf., e.g., *International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 289 F.2d 757 (D.C. Cir. 1960).

[11] Cf., e.g., *N.L.R.B.* v. *Ampex Corporation*, 442 F.2d 82 (7th Cir. 1971).

[12] The pre-1947 situation was one that "generated much criticism." As a result, the Hartley Bill in the House envisioned the creation of a new federal agency whose functions would be the issuance and prosecution of complaints before the Board. In the absence of such a provision in the Senate Taft Bill, a compromise occurred in conference. The conferees adopted the substance of the House proposals, incorporated them into the existing Board structure and thereby avoided the creation of a separate prosecutorial agency. There was "no doubt that Congress intended to make the General Counsel's decisions unreviewable by the Board." *International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 289 F.2d 757, 761 (D.C. Cir. 1960), and authorities cited therein.

This severe dislocation in the administration of the Act, it is submitted, warrants review by the Court.

2. The Instant Case Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court.

Review by this Court is also warranted to resolve an important, unanswered question of federal law. Where, as in this case, there is a final administrative decision of the General Counsel,[13] an equity action should lie in district court to consider whether such actions constitute an abuse of discretion. As one court observed, in holding that a district court has jusisdiction in such a case, "if Congress in its wisdom could see the need for a right of review from a decision entered by the National Labor Relations Board, as provided in Section 10(f) of the Act, it is difficult to understand how the Defendants can argue that a decision of General Counsel, as in the instant case, is not reviewable. This Court finds jurisdiction conferred by 28 U.S.C. 1337." *Local 112, International Union Allied Industrial Workers of America* v. *Rothman,* 209 F.Supp. 295, 297 (D.D.C. 1962).

This view, however, is by no means uniform. Mr. Justice Douglas recently commented that "since we have not yet ruled on the refusal of the General Counsel to act, that route *might be open* although at present the authority is to the contrary." *Amalgamated Asso-*

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[13] The final administrative nature of the General Counsel's July 22 denial of Petitioners' appeal (App. 13a) is clear from the authorities cited in the previous section of this petition. In addition, the General Counsel's determination "that the Regional Director . . . acted in accord with our practice" and his representations as to "Agency practice" (App. 13a) also significantly omit any mention of further administrative review as is the customary practice where rights of appeal exist.

ciation of Street, Electric Railway and Motor Coach Employees of America v. *Lockridge*, 403 U.S. 274, 29 L.Ed. 473, 493, n. 2 (1971) (dissenting opinion; emphasis added). The law is thus "in a state of flux." *Saez* v. *Goslee*, — F.Supp. — , 79 LRRM 2001, 2004 (D.P.R., Dec. 3, 1971).[14] The present case affords an appropriate vehicle for clarification as well as reaffirmance, in this significant area of the law, of the "hospitable interpretation" that must be given to the "generous review provisions" of the Administrative Procedure Act. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).[15]

The present case also provides the Court with an opportunity to correct the Eighth Circuit's erroneous interpretation of *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938). Contrary to the Circuit's view, that case does not foreclose district court review of "all questions of the regularity of Board proceedings, constitutional rights, or statutory authority" apart from the limited applicability of *Leedom* v. *Kyne*, 358 U.S. 184 (1958). App. 3a. *Myers* also permits an

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[14] See also, e.g., *Hourihan* v. *N.L.R.B.*, 201 F.2d 187, n. 4 (D.C. Cir. 1952) ("We need not canvass whether, and if so under what circumstances, a court can correct an abuse of discretion by the General Counsel in failing to issue a complaint"); *Southern California District Council of Laborers* v. *Ordman*, Civil No. 70-603-HP (C.D. Cal. Sept. 18, 1970) and the revised decision in *Bandlow* v. *Rothman*, 278 F.2d 866 (D.C. 1960), *cert. den.*, 364 U.S. 909 (1960).

[15] In *Abbott Laboratories*, this Court noted that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S. at 141. See also *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970) ("[J]udicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated") and H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 41 (1946) ("The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review").

equity action to contest actions of the General Counsel which are not subject to Board review by virtue of Section 3(d). Indeed, to the extent that the decision below fails to give weight to this important exception to *Myers*, the instant case is in direct conflict with *Jewel Companies, Inc.* v. *F.T.C.*, 432 F.2d 1155 (7th Cir. 1970). There, in a virtually identical situation arising under the Federal Trade Commission Act (15 U.S.C. § 21, *et seq.*), the controlling precedent was found not to be *Myers* but *Skinner & Eddy* v. *United States*, 249 U.S. 557 (1919). The same reasoning should similarly have been applicable to the instant case—as in *Jewel*, the issue here is "inherently legal"; there is no need for application of agency "expertise"; the "legal obligation of [the General Counsel] can be determined by the courts without delay"; and there is "no effective way of presenting the claim of invalidity at any later date." 432 F.2d at 1168, 1169.[16]

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[16] *Jewel* also recognized, as the court below failed to, that the doctrine of exhaustion of administrative remedies, assuming *arguendo* that it is applicable here, is not rigid dogma. The Seventh Circuit noted, in commenting on *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), that this Court "may be 'saying between the lines that a court has a discretionary power to require exhaustion or not . . .'," citing Davis, 3 Administrative Law Treatise § 20.02 at 23 (1965 Supp.). *Jewel* also quoted the following observations of Professor Jaffe (Jaffe, Judicial Control of Administrative Action, 435 (1965)):

> The existence of an important general question may warrant early review. . . . the situation is no longer what it was when [*Myers* v.] *Bethlehem* was decided. On the one hand there is no longer the same violent disposition to fight the agencies willy-nilly; on the other, we have learned that agency procedures can be as long-drawn out, as wasteful, as oppressive as the worst of judicial procedures.

Applying these principles, it is all the more apparent that *Myers* does not apply to the instant case. The conduct of the General Counsel complained of is now final and no purpose would be served by postponing judicial review. On the other hand, by delaying or

3. The Participatory Rights of Charging Parties Here Involved Should Be Recognized by This Court.

The General Counsel in this case has issued a complaint based upon Petitioners' charges. The adjudicatory phase of the unfair labor practice proceeding has thus begun. At this point, as this Court emphasized in *United Automobile Workers* v. *Scofield,* 382 U.S. 205, 219 (1965), "the charging party is accorded formal recognition; he may call witnesses and cross-examine others, may file a petition for reconsideration to a Board order . . . ." Lower courts have held to the same effect.[17] Even the Board's own rules provide that once the adjudicatory phase of an unfair labor proceeding has commenced the charging party is provided with a significant role and substantial protection of his interests.[18]

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foreclosing review, the court below encouraged the "unnecessary duplication of proceedings" and deification of "technical requirements" condemned by this Court in *United Automobile* v. *Scofield,* 382 U.S. 205, 212 (1965). If the General Counsel has erred, as Petioners contend, then surely he should be required to rectify that error at a time when evidence is still available and at a juncture when meaningful all-party negotiations are still possible.

[17] See *Marine Engineers Beneficial Association* v. *N.L.R.B.*, 202 F.2d 546, 549 (3rd Cir. 1953) (": . . the charging party, after complaint is issued . . . is entitled to a chance to be heard as the Administrative Procedure Act requires. He has a right to object if after hearing he does not like the result. But he certainly has nothing on which to base his objections unless there is a hearing and a record is made so that the court has something to go on."); *Leeds & Northrup* v. *N.L.R.B.*, 357 F.2d 527 (3rd Cir. 1966); and *Automobile Workers* v. *N.L.R.B.*, 231 F.2d (7th Cir. 1956).

[18] See Section 101.9(a) of the Rules and Regulations of the National Labor Relations Board (App. 19a):

> "Thus, after the complaint has been issued . . . the attorney in charge of the case and the regional director [shall] afford *all parties* every opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustments . . ." (emphasis added).

Settlement negotiations constitute the General Counsel's substitute for a hearing. On the basis of such negotiations, the violations found, the remedy, the scope of the notice and the record before a circuit court on both enforcement and contempt are determined. If, as the Court recognized in *Scofield,* the charging party has the right to intervene in an enforcement proceeding, he must also have some right to develop the record in the negotiations which culminate in such judicial consideration, especially since the settlement agreement is the sole record before the Court in such a case.[19] And the exclusion of the charging party from settlement negotiations also deprives him of his only opportunity to press for a broader or more effective remedy, a lost opportunity which any ultimate judicial review under Section 10 can never cure.[20]

The sole reason advanced by Respondent in the court below for excluding a charging party from set-

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[19] The overriding importance of settlement negotiations to charging parties was vividly demonstrated by exhibits which Petitioners presented to the court below. These exhibits analyzed all settlement agreements involving Section 8(b)(4) of the Act which had come before the General Counsel and the Board in the past three fiscal years to which a charging party filed objections. They showed that *in no case* did the General Counsel or the Board change the agreement to conform to the changes proposed by the objecting charging party. Thus, the ultimate terms and remedy arrived at in the settlement negotiations, *without exception*, became the charging party's sole protection against a repetition of the union's secondary boycott.

[20] In a Section 10 proceeding, the Court would have before it only the agreement arrived at between the general counsel and the charged parties behind closed doors. So far as the record shows, *that agreement* and the Board's superimposed order may be entitled to enforcement. However, if given the opportunity to participate in the negotiations, the charging party might well have secured consent to a different agreement with more favorable terms and greater protection. Such a broader agreement may likewise have been supported by the record and entitled to enforcement.

permitted full participatory rights at a hearing, including, for example, the right to cross-examine witnesses, to present their own witnesses and to file exceptions and briefs. What could then be so sacrosanct about settlement negotiations that, unlike a hearing, the charging party is accorded none of these protections? Permitting charging parties to engage in a meaningful way in settlement negotiations is also consistent with the charged party's discovery rights,[22] the Freedom of Information Act (5 U.S.C. § 502,[24] and the principles of private party participation which have been recognized with respect to other agencies[25] and the overriding Congressional concern that neutral employers be afforded effective protection against the secondary boycott.[26] The rights here involved, accordingly, deserve express recognition by this Court.

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[22] See, e.g., *Madden* v. *Milk Wagon Drivers Union*, 229 F. Supp. 430 (N.D. Ill. 1964); and *Fusco* v. *Richard W. Kaase Baking Co.*, 206 F. Supp. 459 (N.D. Ohio 1962).

[24] See, e.g., *Getman* v. *N.L.R.B.*, — F.2d —; 78 LRRM 2101 (D.C. Cir. Aug. 31, 1971); and *American Mail Lines* v. *Gulick*, 411 F.2d 696 (D.C. Cir. 1966).

[25] See, e.g., *Moss* v. *C.A.B.*, 430 F.2d 891 (C.A. D.C., 1970).

[26] See, e.g., II Legislative History of the Labor-Management Reporting Act of 1959, pp. 989, 1376, 1425, 1446 and 1842 (1959); and Senate Report No. 105, 80th Cong., 1st Sess. (1947).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit. Dated November 3, 1971.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 20,462
No. 20,472

SEARS, ROEBUCK AND CO., and
TERMINAL FREIGHT COOPERATIVE ASS'N., and
TERMINAL FREIGHT HANDLING CO.,
Appellants,

v.

JOSEPH H. SOLEIN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

November 3, 1971.

Before MEHAFFY, Ross and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The facts of this case are fully revealed in *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440

F.2d 124 (8 Cir. 1971)[1] (hereinafter referred to as "Solien I") and *Terminal Freight Handling Co.* v. *Solien*, 444 F.2d 699 (8 Cir. 1971)[2] (hereinafter referred to as "Soliten II"). Only those directly pertinent will be restated.

Appellants filed an unfair labor practice charge with the NLRB alleging that Teamsters Local 610 was engaging in a secondary boycott in violation of § 8(b)(4)(B) (29 U.S.C. § 158(b) (4)(B)). After an initial refusal to do so (see *Solien* II), the Regional Director petitioned for a temporary injunction pursuant to § 10(l) (29 U.S.C. § 160 (1)). The Regional Director, however, conducted unilateral settlement negotiations with the Union to dispose of the charges set forth in the complaint. When the Regional Director refused appellants permission to participate in the negotiations, they instituted the present action in district court where it was dismissed for lack of subject matter jurisdiction.

Appellants assail Judge Harper's dismissal of their suit to enjoin the Regional Director from approving or engaging further in settlement discussions without the informed participation of the charging parties (the appellants). Over appellants objections, the Regional Director and the Union executed a formal settlement agreement which provided for the entry of a Board order and enforcement decree from the Court of Appeals. The settlement agreement having been approved by the General Counsel, it has been submitted to the Board.

The gist of appellants' claim is thus: Rather than pursue the prescribed course of temporary injunction, hearing and

---

[1] In *Solien I*, this Court ruled that a charging party does not possess the status of a full party litigant nor can it intervene in a district court injunction proceeding pursuant to § 10(l) of the National Labor Relations Act.

[2] In *Solien II*, this Court ruled that upon a *reasonable cause* determination by the Regional Director pursuant to § 10, and if he is unable to secure a cessation of the unlawful conduct upon summary demand or by negotiation, it is mandatory that he then petition for temporary injunction and issue a complaint.

Board order (in which event the charging parties would have limited rights to call, examine and cross-examine witnesses and present evidence for the record), or conclude an informal settlement agreement (in which event the concurrence of the charging parties must be obtained, see *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (3 Cir. 1966)), the Regional Director elected to negotiate a formal settlement agreement with the Union while refusing to allow appellants the right to participate in such negotiations. Although appellants may formally object to the proposed settlement by appeal to the General Counsel and the Board, appellants assert that their exclusion from the negotiations effectively prevents them as charging parties from sufficiently learning the facts in order to formulate meaningful and valid objections to the settlement agreement. They claim the broadened rights granted to charging parties under the policy expressed in *United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), have here been arbitrarily denied them by the Regional Director and General Counsel.

Appellants also assert that the district court has jurisdiction over this subject matter. They contend that § 3(d) (29 U.S.C. § 153(d)) which grants to the General Counsel *final authority* concerning § 10 investigations, charges and prosecutions, precludes the Board from reviewing the issue at hand, thereby foreclosing any appellate review of their claim. In short, appellants contend the district court is the only avenue open to them for judicial review of the actions of the Regional Director and General Counsel since there are no further administrative remedies available. We disagree.

It has long been settled that jurisdiction to prevent persons from engaging in unfair labor practices is exclusively vested in the Board and courts of appeals. Upon review by the appellate court, all questions of the regularity of Board proceedings, constitutional rights, or statutory authority are open for examination. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *United Aircraft*

Corp. v. *McCulloch*, 365 F.2d 960 (D.C. Cir. 1966). There is one exception to the rule. A district court has jurisdiction when the Board or its agents engage in acts which are either contrary to specific prohibitions of the Act or are in excess of their delegated powers. *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Solien II*, *supra*, at 703-704. Appellants, however, must also contend with the rule of judicial administration that no judicial relief is available unless the prescribed administrative remedies have been exhausted. *Myers* v. *Bethlehem*, *supra*, at 50-51, and *Meekins Inc.* v. *Boire*, 320 F.2d 445 (5 Cir. 1963).

Appellants claim that the conduct of the Regional Director was contrary to the Rules and Regulations promulgated by the Board.

Relevant excerpts of the Board's Rules are as follows:

> 29 C.F.R. § 102.8 Party.
>
> The term "party" as used herein shall mean . . . *any person filing a charge or petition under the act*, ...
>
> § 101.9 Settlement after issuance of complaint.
>
> (a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director *afford all parties every opportunity for the submission of facts, arguments, offers of settlement, or proposals of adjustment*, except where time, the nature of the proceedings, and the public interest do not permit.
>
> (c)(2) If the settlement agreement approved by the regional director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the regional director's written statements, are submitted to Washington, D. C., where they are reviewed by the general counsel. If the general counsel decides to approve the settlement agreement, he shall so inform the

charging party and *submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent.* * * * (emphasis added).

From reading the above rules, we cannot say that the practice of the Regional Director in excluding charging parties from formal settlement negotiations is clearly contrary to the Board's directives in §.101.9(a). Indeed, however meritorious appellants' claim may appear, it is not for us to determine this critical issue at this time. Section 101.9(c) (2) clearly states that this issue is reviewable not only by the General Counsel but also by the Board and, therefore, an appellate court. See also *Leeds & Northrup Co.* v. *NLRB, supra,* at 534. We conclude appellant may still obtain administrative relief from the Board. Furthermore, the Board itself is the appropriate tribunal for primary interpretation of its own rules. See *NLRB* v. *Monsanto Chemical Co.,* 205 F.2d 763 (8 Cir. 1953); *NLRB* v. *Grace Co.,* 184 F.2d 126 (8 Cir. 1950) and *NLRB* v. *J. S. Popper, Inc.,* 113 F.2d 602 (3 Cir. 1940). *Cf. Textile Workers Union of America* v. *NLRB,* 294 F.2d 738 (D.C. Cir. 1961).

In conclusion, we cannot say that the conduct complained of is clearly in excess of the Regional Director's power. Since a determination of this issue is dependent upon a construction of the rules adopted by the Board, the Board itself is the proper forum to first pass on this matter. Furthermore, it is clear that appellants have not exhausted their available administrative remedies. A mere assertion of illegality of a practice of the Regional Director when full Board and appellate review is available is insufficient to grant the district court subject matter jurisdiction in the face of the well established doctrine of exhaustion of administrative remedies.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment of the United States Court of Appeals for the Eighth Circuit Dated Nov. 3, 1971

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 20462
No. 20472

SEARS, ROEBUCK AND CO., and
TERMINAL FREIGHT COOPERATIVE ASSOCIATION and
TERMINAL FREIGHT HANDLING CO.,
Appellants,

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

November 3, 1971

These causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri and were argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby affirmed.

Costs Taxed in Favor of the Appellee:

Cost of printing Appellee's Brief	$200.15
Total Cost of Appellee for Recovery from Appellants in U.S. District Court	$200.15

Dated: November 3, 1971

Order of the United States District Court For the Eastern District of Missouri, Eastern Division, Dated July 30, 1970.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SEARS, ROEBUCK AND CO., and
TERMINAL FREIGHT COOPERATIVE
ASSOCIATION and
TERMINAL FREIGHT HANDLING CO.,
Plaintiffs,

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board,
Defendant.

No. 70 C 356(1).

ORDER.

Motion of defendant to dismiss the complaint for lack of jurisdiction, sustained, and said cause is dismissed for lack of jurisdiction.

/s/ Roy W. Harper
U. S. District Judge

(Dated: July 30, 1970).

On July 2, 1970, and pursuant to the original and amended charges filed by the charging party herein in Case No. 14-CC-603, the Regional Director issued a consolidated complaint against the Union, alleging in general boilerplate terms, various acts and conduct in violation of Section 8 (b) (4) (ii) (B) of the Act. The case is set for hearing before a trial examiner on July 27, 1970.

Following the issuance of said complaint, the charging party learned that the Regional Director had considered and was conducting settlement discussions with representatives of the Union and that various proposals and counter proposals had been and were being exchanged. The charging party was not and has not been apprised of the nature or content of said settlement proposals, nor was it afforded any advance notice of said discussions or an opportunity to be present and to participate in said settlement negotiations. Furthermore, the Regional Director did not and has not given the charging party an opportunity to suggest settlement terms which would or might be acceptable to the charging party or to otherwise state its position regarding any such settlement.

As a result, the charging party's attorney, D. J. Sullivan, on July 14, 1970, wrote to the Regional Director inquiring as to whether any settlement negotiations had occurred and requesting, in the event said discussions were occurring, that said discussions cease until such time as the charging party is afforded advance notice thereof and the opportunity to participate in all such discussions.

Receiving no response to the aforesaid letter, attorney Sullivan did, on July 15, 1970, meet with the Regional Director, at which time he was advised that extensive settlement negotiations had occurred and were occurring with representatives of the Union, that as of that date no acceptable settlement had been obtained.

Upon receipt of this information, Attorney Sullivan thereupon again requested, as the representative of a party to the proceeding, that the Regional Director:

(a) advise the charging party of the dates and times of any further settlement negotiations and afford the charging party an opportunity to be present and to participate in any and all future negotiations; and

(b) furnish the charging party with copies of all affidavits in his possession, upon which the Regional Director relied in issuing the foregoing complaint, so that the charging party could properly evaluate and determine the appropriateness of any proposed settlement and, in the event settlement was not obtained, to enable the charging party to prepare its own case for trial.

The Regional Director refused to grant any of the foregoing requests, claiming that the charging party had no right to the same. Furthermore, although confirming that it was customary practice within the region to supply to the charging party in advance of trial a copy of the region's trial brief to the charging parties, the Regional Director indicated that the charging party would not be supplied with such a document in the instant case.

6. The charging parties' request to be present at any and all settlement discussions with the Respondent Union is predicated on its fundamental right as a statutory party to fully participate in the instant proceeding, in which complaint has been issued and in which a hearing date has been scheduled. As a party, the charging party herein is entitled to be heard with respect to any and all "settlement proposals and to participate in any discussions or negotiations pertaining thereto. *Leeds and Northrup v. NLRB*, 382 U.S. 205.

Consistent with that right, the charging party is in need of and entitled to certain information, including the

aforesaid requested affidavits, showing the facts upon which the Regional Director relied in issuing his complaint herein.

Said information is essential to enable the charging party to determine whether any settlement proffered by the respondent Union and/or the Regional Director will satisfactorily and effectively remedy the underlying violations and serve to prevent a recurrence of the unlawful acts and conduct to which the Regional Director determined the charging party had been and is being subjected. Furthermore, in the event a settlement is not obtained, said information is needed to enable the charging party to properly prepare its own case for trial.

The charging party submits that all of the foregoing requests must be granted if it is to be afforded its statutorially recognized status as a full party in an NLRB complaint proceeding and in order to fully effectuate its rights therein consistent with established law. See, *United Automobile Workers* v. *Scofield*, 382 U. S. 250 (1965); *Leeds and Northrup* v. *NLRB*, *supra*.

For the reasons set forth above, the charging party moves that the General Counsel reverse and overrule the Regional Director's arbitrary and unwarranted actions, as herein specified, and that he forthwith order and direct the Regional Director to:

(1) immediately cease and desist from engaging in any further *ex parte* communications with the respondent Union pertaining to settlement of the instant case or further engaging in any *ex parte* negotiating sessions; and

(2) promptly give the charging party reasonable advance notice of any future settlement conferences and give the charging party an opportunity to be present and to participate in any future settlement negotiations; and

(3) make available to the charging party any and all settlement proposals, whether written or otherwise, heretofore considered by the Regional Director; and

(4) make available to the charging party for inspection and copying all affidavits or other evidence in the custody and control of the Regional Director upon which he relied in issuing the complaint herein, excluding any internal agency memorandum or communications which would be privileged from disclosure under Public Law 90-23, 5 U. S. C., § 552(b).

The charging party further requests a ruling on the matter set forth herein at or before 2:00 p.m. (ESDT) on July 17, 1970. The charging party submits that it has already suffered and is continuing to suffer substantial and irreparable harm and in derogation as its right as a charging party by the continuance of the above described *ex parte* settlement discussions. This irreparable harm creates the necessity for a prompt reversal of the Regional Director's determinations within the time limitation prescribed herein.

Respectfully submitted,

S. RICHARD PINCUS
LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Charging Party,
Sears, Roebuck and Co.

July 17, 1970.

Decision of the General Counsel of the National Labor Relations Board On Appeal From Regional Director's Denial of Charging Parties' Rights. Dated July 22, 1970.

National Labor Relations Board
Office of the General Counsel
Washington, D. C. 20570

July 22, 1970

S. Richard Pincus, Esquire
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602

Re: Sears, Roebuck & Company
Case No. 14-CC-603

Dear Mr. Pincus:

This is in reply to the document delivered to my office on Friday, July 17, 1970, which was phrased and headed as being in the nature of a formal "Appeal" from certain actions taken by the Regional Director in the above matter and your request for information.

I have inquired into the matter and find that the Regional Director in each instance acted in accord with our practice and properly rejected your request. In sum, it is our position that:

(1) There is no requirement under Agency practice that all concerned parties be present whenever settlement proceedings are being explored prior to the opening of formal hearings between Agency staff members and any of the parties. By the same token, notice of conferences for purposes of settlement on the subject matter of such conferences need not be transmitted to all concerned parties. On the other hand, any settlement proposal which the Office of the General Counsel, acting through its Regional Director or other authorized Agency representative,

might consider as acceptable would be submitted to all such concerned parties and their views would be taken into account in connection with the determination as to whether or not such settlement should be approved.

More specifically, and in direct response to your request, *Leeds & Northrup*, whatever else it requires, does not require that we notify a charging party of when the preliminary settlement negotiations are to be held or furnish it with various preliminary working settlement proposals which might be submitted in an attempt to arrive at a final settlement proposal, nor does it hold that a charging party has the right to be present and participate in the preliminary settlement discussions between the Director and a respondent.

(2) A charging party is not entitled to inspect or copy the affidavits or other evidence upon which a Director relies in issuing a complaint. All such matter is privileged and, moreover, the Director's mental processes and the particular bases upon which he predicated his conclusion to issue a complaint are irrelevant to any proceeding on the complaint and not an appropriate subject for inquiry either during the proceedings before the Board or prior thereto.

Finally, you also complain that the Regional Director refused to furnish you with an advance copy of the Region's trial brief. It is my information that no such brief has been prepared thus far. In any event, however, the Director is not required to furnish you with copies of any brief except at the time such brief is submitted to the trial examiner or to the Board.

Very truly yours,

/s/ ARNOLD ORDMAN
ARNOLD ORDMAN
General Counsel

STATUTES INVOLVED

NATIONAL LABOR RELATIONS ACT (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) .

Sec. 3(d), 29 U.S.C. § 153(d):

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

* * *

Sec. 10(e), 29 U.S. C. § 160(e):

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served

upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that, the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * *

Sec. 10(f), 29 P.F.C. § 160(f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief

sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

ADMINISTRATIVE PROCEDURE ACT, (80 Stat. 381, 5 U.S.C. § 701, *et seq.*)

* * *

Sec. 702, 5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Sec. 703, 5 U.S.C. § 703:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by a statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judg-

ments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Sec. 704, 5 U.S.C. § 704:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

* * *

62 STAT. 931, 28 U.S.C. § 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

76 STAT. 744, 28 U.S.C. § 1361:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, SERIES 8, AS AMENDED (29 C.F.R. 102.1 *et seq.*):

Sec. 102.8:

Party.—The term "party" as used herein shall mean the regional director in whose region the pro-

ceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

Sec. 101.9:

Settlement after issuance of complaint.—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D.C. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the regional director, pursuant to his authority to withdraw the complaint before the hearing (section 102.18), may conclude that an informal settlement agreement of the type described in section 101.7 is appropriate. Such an agreement is not subject to approval by the Board and does not pro-

withdrawal of the complaint must be

for his approval. If the

one, final approval

Board. If any party will not join

agreed to by the other parties, the

will give such party an opportunity to

record or in writing its reasons for op-

trial examiner decides to accept or reject

settlement, any party aggrieved by such

ask for leave to appeal to the Board as

section 102.26.

event the respondent fails to comply

terms of a settlement stipulation, upon which a

order and court decree are based, the Board may

the court to adjudge the respondent in con-

If the respondent refuses to comply with the

of a stipulation settlement providing solely for

entry of a Board order, the Board may petition the

for enforcement of its order, pursuant to section

of the National Labor Relations Act.

In the event the respondent fails to comply with

terms of an informal settlement agreement, the

Regional Director may set the agreement aside and in-

stitute further proceedings.

Supreme Court, U.S.
FILED
JAN 14 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-924

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE PHILLIPS PLUMBING AND HEATING COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.*

RALPH A. MORRIS,
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Chicago, Illinois,
Attorney for the Phillips Plumbing and Heating Company.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .....

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE PHILLIPS PLUMBING AND HEATING COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.*

*Pursuant to Rule 42(1) of the Rules of this Court, oral consent has been received from all parties hereto to the filing of this brief; *amicus curiae* and written consents are being lodged with the Clerk of the Court.

I.

INTEREST OF THE AMICUS CURIAE.

This brief is filed on behalf of Phillips Plumbing and Heating Company ("Phillips"), a small employer located in Davenport, Iowa. Phillips was recently subjected to a devastating secondary boycott and, as a result, filed unfair labor practice charges with the National Labor Relations Board in order to seek the protection afforded by Section 10(1) of the National Labor Relations Act.[1]

As in the instant case, the Regional Director of the Board found that there was reasonable cause to believe that Phillips' charges were true. Nevertheless, Phillips, like Terminal and Sears in the present case, was not afforded the relief contemplated by Section 10(1). In addition, the Board negotiated a settlement agreement without the charging party's participation. The secondary boycott was continued at Phillips and no injunctive relief was sought. Phillips, as a result, lost valuable contracts in business which it may never be possible to recoup.

Counsel for Phillips is a large national law firm located in Chicago, Illinois representing many employers, both small and large, throughout the United States. The above experience of Phillips, in Counsel's experience, is by no means unique. Rather, it is part of a pervasive practice followed uniformly by the Board. Those cases in which

1. *Local Union No. 562, Affiliated with the U. A. of Journeyman & Apprentices of the U. S. & Canada, AFL-CIO (George Koch Sons, Inc.)*, N. L. R. B. Case No. 17-CC-467.

the Board fails to carry out the statutory command are the rule rather than the exception in Section 10(1) proceedings.[2]

II.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A. The Problems Raised in the Administration of Section 10(1) of the Act Are Exemplified by This Case, and Should Be Ruled Upon by This Court to Effectuate the Purposes of the Act.

As noted above, the experience of Terminal and Sears here is typical of a recurrent pattern utilized by the Board in its administration of the Act. The resultant harm experienced by employers, whose only effective protection from secondary boycotts is Section 10(1),[3] is widespread and substantial. Since most charging parties are small employers who can afford neither prolonged picketing or expensive litigation,[4] this case is an appropriate vehicle for this Court to now resolve the present controversy.

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2. As the Court below found, Board Regional Directors seek 10(1) injunctive relief in only *one-quarter* of all cases where there has been a finding of reasonable cause to believe there has been a secondary boycott. App. to Pet. for Cert., p. 8, n. 9.

3. That a Section 10(1) injunction is the only effective remedy is adequately demonstrated by the substantial delays experienced when alternative routes are followed. An employer who is experiencing secondary pressures cannot withstand those pressures through the lengthy ordeal of investigation of the charge and issuance of a complaint, of the hearing before the Trial Examiner and a ruling upon his decision by the Board, and of finally enforcing the Board's order in a court of appeals. Through participation in the Board's procedures, Phillips and others have realized not only the costly delays but also their paralyzing economic effect upon the employer.

4. For example, more than 50% of the charges involving Section 10(1) that were filed in 1969 were filed by employers with less than 30 employees. *33rd Annual Report of the National Labor Relations Board (1968)*, Table 18, pp. 238-239.

B. The Present Case Arises in the Contexts of Other Significant Issues Which This Court Should Also Consider.

The present case is being submitted to the Court as part of a multi-faceted dispute raising numerous significant questions affecting the rights of charging parties generally. These questions are also recurrent and, for the reasons previously discussed, likely to continue to escape review by this Court. Phillips therefore concurs with the position of Terminal that the present case should be considered in conjunction with these related matters. Petitions for certiorari in these cases have recently been filed with this Court,[5] and to underscore the overall importance of this case, identical versions of the present brief are also being filed therein.

CONCLUSION.

For the aforegoing reasons, Phillips requests this Court to grant the instant petition for certiorari.

Respectfully submitted,

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5. *Sears, Roebuck and Co.* v. *Solien*, No. .....; and *Terminal Freight Cooperative Association* v. *Solien*, No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-924

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY, *Petitioners,*

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Respondent.*

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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STATUTE:

Section 10(1) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*, 29 U.S.C. § 160(l) 2, 3, 4

MISCELLANEOUS:

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93 Cong. Rec. 6383, 80th Cong. 1st Sess. (1947), 2 Leg. Hist. 1538 5

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IN THE

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v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Respondent.*

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

INTEREST OF THE AMICUS CURIAE.

This brief is filed on behalf of the Chamber of Commerce of the United States of America, a federation with a membership of over 3,700 state and local chambers of commerce and trade associations, an underlying membership of about five million business

firms and individuals, and a direct business membership in excess of 32,000.[1]

This case, together with two others currently pending before the Court on petitions for writs of certiorari, raise important questions of first impression regarding the interests of charging parties in proceedings under Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. § 151, *et seq.* hereafter referred to as "the Act"), 29 U.S.C. § 160(1), and in related administrative proceedings governing settlement agreements. Section 10(1) is the congressionally fashioned relief for the prevention of unlawful secondary boycotts. When Congress amended the Act in 1947 to outlaw secondary boycotts, it provided in Section 10(1) that the appropriate Regional Director of the Board be required to seek a preliminary injunction from the district court in those cases in which it was determined that there was reasonable cause to believe that a violation had occurred. This provision for preliminary relief was included in the Act to counteract the immediate and preemptory economic injury normally resulting from a secondary boycott.

The three cases currently before the Court, which arise out of the same transaction and involve interrelated aspects of Section 10(1) litigation are as they are commonly referred to, *Solien II*,[2] *Solien III* which

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[1] This brief is filed with the written consent of all parties hereto pursuant to Supreme Court Rule 42(1).

[2] *Terminal Freight Handling Co. and Terminal Freight Cooperative Association* v. *Joseph H. Solien*, 444 F.2d 699 (8th Cir. 1971), pet. for cert. pending in No. 71-609.

is the instant case, and *Solien IV*.[3] *Solien II* raises the question of whether, despite the statutory requirement that the Regional Director "shall petition" the district court for injunctive relief upon a finding of reasonable cause, he nevertheless may decline to do so in favor of securing lesser or other relief through a settlement with the union. *Solien III*, the case here, involves three problems which intertwine with and directly concern Section 10(1) proceedings: whether the Board may supervise the conduct of settlement negotiations by the General Counsel of the Board (herein the "General Counsel"); whether the district courts may review an abuse of administrative discretion by the General Counsel; and whether the charging party should be allowed to participate in settlements in Board cases. *Solien IV* poses the closely related issue of what rights and status a charging party has in a Section 10(1) proceeding, particularly with respect to presenting objections to a stipulation proposed by the Regional Director as a basis for resolving the Section 10(1) court proceedings.[4]

These problems exemplify the unchartered area of procedure in Section 10(1) proceedings and in closely

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[3] *Terminal Freight Cooperative Association and Terminal Freight Handling Co.* v. *Joseph H. Solien and Miscellaneous Drivers and Helpers Union No. 610, I.B.T.C.W. and H.A.*, No. 71-1650, 8th Cir., Sept. Term 1971; pet. for cert. pending in No. 71-925.

[4] In *Solien I, Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971), the Court of Appeals held that the employer-charging party in a Section 10(1) proceeding did not enjoy the full status of a party-litigant. Certiorari was sought but denied on July 7, 1971 (No. 1588, October Term 1971, reh. denied November 15, 1971), although in two previous cases, the Court had granted certiorari on that issue, only to have the question become moot before it was decided. *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655; *The Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970).

related administrative proceedings before the General Counsel of the Board, with which the bar and the courts must contend. Because of the lack of authoritative guidance, conflicts and uncertainty have arisen weakening the effectiveness of Section 10(1) of the Act. As these questions center upon the employer's rights as the charging party, the Chamber and its members have a direct, vital interest therein, as representative of employers who must rely upon Section 10(1) as the only effective relief from precipitous injury from a secondary boycott. The Chamber has also filed briefs *amicus curiae* in *Solien II* and in *Solien IV*.

For these reasons the Chamber respectfully requests the Court to consider its views on the issues herein which are of serious national concern.

II.

REASONS FOR GRANTING THE WRIT.

1. This Case Raises Serious Problems Concerning the Separation of Powers Between the Board and the General Counsel of the Board and Creates a Conflict Between Circuits.

The Court below held that by failing to request Board review of the ruling of the General Counsel, the Petitioners failed to exhaust their administrative remedies and are barred from court review. However, such result fails to recognize that the Board has no authority to review those actions of the General Counsel which are performed in the exercise of his prosecutorial functions, and that consequently the courts are the only available forum to correct an abuse of discretion. Here, the General Counsel denied the Petitioners standing to participate in negotiations that led to the settlement of the case which had been filed

by the Petitioners. The court below misconceives the scope of the Board's authority to review settlement agreements: that authority is limited to considering the contents of the settlement and does not extend to reviewing the procedure employed in negotiating the agreement. Clearly, the procedure by which settlement agreements are arrived at is one of those matters which Congress committed to the General Counsel, independent of the Board's supervision.

Beyond question, the legislative history establishes that the separation of functions is fundamental to the proper administration of the Act. When the Congress revised the Act in 1947, it established the Office of the General Counsel to eliminate the evil of a single authority acting as prosecutor and judge. (See *e.g.* the remarks of Representative Hartley, 93 Cong. Rec. 6442, 80th Cong., 1st Sess. (1947), 1 Leg. Hist. 883; 93 Cong. Rec. 6383, 80th Cong., 1st Sess. (1947); 2 Leg. Hist. 1538). The intent was to confer upon the General Counsel complete independence of the Board in such matters, as is shown by the Conference Report:

> "The General Counsel . . . is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board."

House Conference Report No. 510 on H.R. 3020, p. 37, 80th Cong., 1st Sess. (1947), 1 Leg. Hist. 541.

Moreover, the fundamental importance of the separation of powers doctrine is demonstrated by the current debates over the enforcement powers of the Equal

Employment Opportunity Commission (herein the EEOC). One of the objections to giving the EEOC cease and desist powers such as those possessed by the Board was the unfairness in having the Commission both prosecute and judge cases before it. Consequently, the sponsors of the legislation accepted an amendment from the floor creating a division of functions between the Commission and its General Counsel. 118 Cong. Rec. 85, 101-102, 92nd Cong., 2nd Sess. (Jan. 19, 1972).

The decision below if allowed to stand would require the Board to establish a review procedure with respect to the actions of the General Counsel which are within his prosecutorial authority. Such overall supervision by the Board would erode the independence of the General Counsel and subvert the intent of Congress. Also, the decision is in direct conflict with the decision of the United States Court of Appeals for the Third Circuit in *Terminal Freight Cooperative Association* v. *N.L.R.B.*, 447 F.2d 1099 (1971). There the Third Circuit held that the actions of the General Counsel taken prior to the issuance of a complaint could not be reviewed by any tribunal. Although this extreme view disregards, among other matters, the role of the district court in correcting an abuse of discretion,[5] the conflict demonstrates the inherent mischief in allowing this matter to go unresolved.

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[5] The authority of the district courts to review actions of the General Counsel is also raised by this case and the Chamber urges that the writ be granted for that reason also. The grounds for doing so are fully set forth in the Petition for Writ of Certiorari.

2. The Court Should Decide the Rights of a Charging Party To Participate in the Negotiations of An Administrative Settlement.

A determination of the rights of the charging party with respect to his participation in administrative settlement agreements is of paramount importance. There is no gainsaying that administrative settlements are crucial to the feasibility of administering the Act. The "manifest importance of . . . settlement agreements" was early recognized, such as in *Poole Foundry & Machine Co.* v. *N.L.R.B.*, 192 F.2d 740, 742 (4th Cir. 1951), where the court approved the following recommendation of Attorney General's Committee on Administrative Procedure (1941):

> "Probably over 90 per cent of the matters coming before administrative agencies are disposed of informally with the acquiescence of the private interest affected [6] and no formal trial proceedings. This must be so or government could not function * * *. The committee recommends that agencies which bring proceedings for the discontinuance of practices prohibited by law employ the informal methods used by the National Labor Relations Board, * * * to obtain in appropriate cases discontinuance by agreement without issuing complaints * * *."

In recent years about 90 per cent of all Board cases have been disposed of without formal adjudication. Approximately 80 per cent of all matters which the General Counsel believes to be meritorious are settled prior to a decision by the Board. *Thirty-Fifth Annual*

[6] The acquiescence of the private interest affected refers only to the respondent in a Board case, not to a charging party, for the General Counsel frequently closes cases based upon a unilateral settlement in which the charging party has not concurred.

Report of the National Labor Relations Board for 1970, pp. 1, 4; *Thirty-Fourth Annual Report of the National Labor Relations Board for 1969*, p. 1.

In view of the preeminence given to settlements in administering the Act, the rights of the parties in the procedures governing settlements are of the utmost concern. The charging party's interest in formal proceedings before the Board and the Courts has won recognition (*United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965)), as has his right to an evidentiary hearing on his objections to a settlement proposed by the Regional Director. *Marine Engineers Beneficial Association* v. *N.L.R.B.*, 202 F.2d 546, 549 (3rd Cir. 1953); *Leeds & Northrup* v. *N.L.R.B.*, 357 F.2d 527 (3rd Cir. 1966). However, of at least equal importance is the interest of the charging party in meaningful participation at the formative stages of settlement negotiations, including the right of being advised of the evidentiary basis upon which a settlement is contemplated. It is only thus that he may effectively project his views as to the remedial adequacy of the settlement, and in some degree affect his own destiny within the proceedings that he himself initiated and in which he has a vital concern.

Finally, we urge the Court to grant the writ of certiorari because there may well be no other occasion for review of these important questions. As settlements are of the most use to parties with limited means and as the legal avenues for obtaining review of settlement procedures are ill-defined, it is unlikely that parties will be inclined to bring the problems to the Court's attention. This ground alone is sufficient to warrant consideration of such important issues. See, *e.g. Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47 (1938). Cf., *Silver King Co.* v. *ConKling Mining Co.*, 256 U.S. 18 (1921).

III.

CONCULSION.

For the foregoing reasons the Chamber urges the Court to grant the petition for writ of certiorari.

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OCTOBER TERM, 1971

SEARS, ROEBUCK AND CO., ET AL., PETITIONERS

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not yet officially reported. The order of the district court dismissing the complaint is set forth at Pet. App. 7a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on November 3, 1971. The petition for a writ of certiorari was filed on January 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the district court properly dismissed a suit to enjoin the Board's regional director from negotiating a settlement of an unfair labor practice case where the party objecting to the settlement failed to exhaust its remedies before the Board and the court of appeals.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), the Administrative Procedure Act (80 Stat. 381, 5 U.S.C. 701, *et seq.*), and the Board's Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are set forth at Pet. App. 15a-21a.

STATEMENT

This case (*"Solien III"*) is the third of four cases which have grown out of an effort by respondent Solien, the Board's Regional Director, to negotiate a settlement of unfair labor practice charges over the objections of the charging parties, Sears, Roebuck and Company ("Sears"), and Terminal Freight Cooperative Association and Terminal Freight Handling Company ("Terminal"). The relevant facts may be sum-

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[1] The other cases, which will be discussed *infra*, are: *Solien* v. *Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F. 2d 124 (C.A. 8), certiorari denied, 403 U.S. 905 (*"Solien I"*); *Terminal Freight Handling Co.* v. *Solien*, 444 F. 2d 699 (C.A. 8), petition for certiorari pending, No. 71-609 (*"Solien II"*); and *Terminal Freight Handling Co.* v. *Solien*, No. 71-1650 (C.A. 8), decided December 17, 1971, petition for certiorari pending, No. 71-925 (*"Solien IV"*).

marized as follows:

In June 1970, Terminal and Sears filed unfair labor practice charges with the Regional Director alleging that Drivers Union Local 610 ("the Union") was engaging in secondary boycott activity in violation of Section 8(b)(4)(B) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(B)) (A. 11-21).[2] The Regional Director, finding reasonable cause to believe that the charges were true, issued a complaint based thereon (A. 31-39), and, pending a final determination by the Board, petitioned the district court, pursuant to Section 10(*l*) of the Act (29 U.S.C. 160(*l*)), for temporary injunctive relief (A. 3-10).[3] Terminal and Sears moved to intervene in the 10(*l*) proceeding as full parties. The Regional Director opposed their motion on the ground that the Act limits the charging party to the right "to appear by counsel and present any relevant testimony" (29 U.S.C. 160(*l*)).

Thereafter, the Regional Director and the Union entered into a stipulation providing for a cessation of the Union's alleged unlawful conduct pending a final adjudication of the charges by the Board, and for the entry of a temporary injunction if the stipulation were violated. (Pet. App. in No. 71-925, pp. 15-20.)

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[2] "A." refers to the appendix to the briefs in the court below.

[3] When the Regional Director deferred seeking a 10(*l*) injunction pending the completion of informal settlement negotiations with the Union, Terminal and Sears instituted suit in the district court (*Solien II*, n. 1, *supra*) to compel the Regional Director to petition for such injunctive relief. See Brief for the Respondent in Opposition, pp. 2-6, *Terminal Freight Handling Co.* v. *Solien*, No. 71-609.

Terminal and Sears filed objections to the stipulation on the ground, *inter alia*, that it should have empowered them to apply for an injunction independently of the Regional Director in the event of a violation. (Pet. App. in No. 71-925, pp. 20-25). The district court denied the motions to accord Terminal and Sears full party status, but required that certain modifications be made in the stipulation; it approved the revised stipulation on July 9, 1970 (Pet. App. in No. 71-925, pp. 26-42). The approved stipulation provided for the entry of a temporary injunction by the court upon the filing of an affidavit by the Regional Director that he had found probable cause to believe that the stipulation was being violated (Pet. App. in No. 71-925, pp. 41-42).[4]

The Union then entered into negotiations with the Regional Director in an effort to settle the unfair labor practice case. In relevant part, the Board's rules provide the following settlement procedures:

After the issuance of a complaint, the agency favors a formal settlement under which "the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the

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[4] Terminal and Sears appealed from the district court's order denying them full party status in the 10(*l*) proceeding, the court of appeals affirmed the order, and this Court denied certiorari (*Solien I*, n. 1, *supra*). On September 13, 1971, after the denial of certiorari in *Solien I*, Terminal filed a motion with the district court to set aside or amend the stipulation which it had approved some 14 months earlier. The district court denied the motion, the court of appeals summarily affirmed the district court, and this is the subject of the petition in No. 71-925 (*Solien IV*, n. 1, *supra*).

respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order." 29 C.F.R. 101.9(b)(1) (Pet. App. 19a).

If the charging party does not join in the proposed settlement, he may file his objections with the regional director. If the regional director approves the settlement notwithstanding the objections of the charging party, he must provide a "brief written statement of the reasons for the approval." 29 C.F.R. 101.9(c)(1) (Pet. App. 20a). If the settlement agreement provides for the entry of a Board order, the agreement "together with the charging party's objections and the regional director's written statements," are submitted to the Board's General Counsel for review. If the General Counsel approves the settlement, he must inform the charging party and submit the agreement together with the charging party's objections and the statement of the General Counsel's reasons in support of the settlement to the Board for approval. "Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board * * * a further statement in support of his objections to the settlement agreement." 29 C.F.R. 101.9(c)(2) (Pet. App. 20a). If the Board ultimately issues an order approving the settlement agreement, the charging party may obtain review of that order in the court of appeals under Section 10(f) of the Act (29 U.S.C. 160(f); Pet. App. 16a-17a).

Instead of following this procedure, Terminal and Sears demanded at the outset that the Regional Director make available to them all evidence relating to the unfair labor practice charges, including the affidavits of prospective Board witnesses, and also permit them to participate in all settlement discussions which might take place with the Union. The Regional Director declined this request on the ground that it was contrary to customary Board procedure, and would impair the integrity of the Board's investigative processes. (Pet. App. 8a-14a.)

Thereupon, Terminal and Sears instituted the present suit *(Solien III)* to enjoin the Regional Director from engaging in settlement negotiations or from approving any settlement agreement, without their full participation including disclosing to them the evidence in the Board's files relating to the alleged unlawful conduct of the Union (A. 84-90). The district court granted the Board's motion to dismiss the suit for lack of jurisdiction over the subject matter (Pet. App. 7a). The court of appeals affirmed, concluding that (Pet. App. 5a):

> * * * we cannot say that the conduct complained of is clearly in excess of the Regional Director's power. Since a determination of this issue is dependent upon a construction of the rules adopted by the Board, the Board itself is the proper forum to first pass on this matter. Furthermore, it is clear that appellants have not exhausted their available administrative remedies. A mere assertion of illegality of a practice of the Regional Director when full Board and appellate review is available is insufficient to grant the district

court subject matter jurisdiction in the face of the well established doctrine of exhaustion of administrative remedies.[5]

ARGUMENT

Petitioners contend that the settlement agreement approved by the Regional Director does not provide an adequate remedy for the unfair labor practices charged, and that the procedure followed by the Regional Director did not afford them an adequate opportunity to participate and to present their views. Under the Board's rules, however, the settlement is not final until it has been approved by the Board; before this occurs, petitioners will have an opportunity to present their objections, first to the General Counsel[6] and then to the Board itself. If the Board ultimately approves the settlement, it will be embodied in a Board decision and order which petitioners can then challenge in the court of appeals. See *Textile*

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[5] Meanwhile, on July 24, 1970, the Union agreed to enter into a formal settlement of the unfair labor practice case, whereby it waived its right to file an answer to the complaint and to a hearing, and consented to the entry of an order by both the Board and the court of appeals enjoining it from engaging in the unlawful activity alleged in the unfair labor practice complaint (Pet. App. in No. 71-925, pp. 69-80). The Regional Director, after considering the objections of Terminal and Sears, recommended that the settlement be approved by the General Counsel and the Board (*id. ut* pp. 81-96). The matter is presently before the General Counsel, who has agreed to reconsider the prior action of his office approving the settlement (Pet. in No. 71-924, p. 5, n. 5).

[6] The General Counsel has agreed to reconsider his prior approval of the settlement (n. 5, *supra*).

Workers of America v. *National Labor Relations Board (Roselle Shoe Corp.)*, 294 F. 2d 738 (C.A. D.C.); *Local 285, International Bro. of Teamsters* v. *National Labor Relations Board (J. J. White Co.)*, 339 F. 2d 795 (C.A. 2).

In sum, petitioners will have a full opportunity to present their objections to the settlement itself and to the manner in which it was negotiated during the subsequent administrative and judicial stages of the proceeding. The court of appeals thus correctly concluded that petitioners' attempt to circumvent this procedure by an equity suit in the district court was contrary to settled principles requiring exhaustion of administrative and statutory review procedures. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752.

Petitioners contend (Pet. 6-9) that, to permit the Board and ultimately the court of appeals to review their objections to the settlement agreement, would impair the final authority which Section 3(d) of the Act (Pet. App. 15a) confers upon the General Counsel "in respect of the investigation of charges and issuance of complaints * * * and * * * the prosecution of such complaints before the Board." The General Counsel has broad discretion to determine whether a complaint should issue on a charge, and, if one has issued, whether to proceed to hearing or to accept a settlement. When he finally decides to accept a settlement calling for a Board order, however, he has exercised his "prosecutorial discretion". Neither the Board nor the court of appeals impinges upon that discretion in subsequently adjudicating any objections

which the charging party may have to the adequacy of the settlement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-924

SEARS, ROEBUCK & CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY,

Petitioners,

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The issues posed in the four *Solien* cases currently pending before this Court [1] raise important questions in the administration of the National Labor Relations Act, in the quest for procedural fairness and in the solution of the practical problems resulting from the absence of this Court's definition of the rights which flow to charging parties under the Act.

Despite the significance of these matters, the National Labor Relations Board, by its General Counsel, has militantly resisted all efforts to obtain any resolution or clarification from this Court. In *Solien I* and *Solien II*, this resistance has taken the form of opposing the granting of certiorari on the ground that the vehicles were "inappropriate", notwithstanding the fact that the issues are recurring ones which will continue to plague those whose vital interests require that they be aware of the nature and limits of their statutory rights. In the instant case, the Board's resistance consists of a failure to give due regard to the breadth of the problems involved, coupled with a misleading statement of the issues to be resolved, the facts of the dispute and the contentions urged by Petitioners.

A. THE ISSUES

The Board's framing of the issues seems designed to render this case inconsequential, hence unworthy of this Court's attention. To the Board, the question presented is whether Petitioners have exhausted their administrative remedies or, as a corollary, whether the Board's rules permit administrative review of the General Counsel's acceptance of a unilateral settlement agreement.

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[1] *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F.2d 124 (CA 8 1971), petition for rehearing pending. (No. 1588; *Solien I*); *Terminal Freight Handling Co., et al.* v. *Solien*, 444 F.2d 699 (CA 8 1971) (No. 71-609; *Solien II*); *Sears, Roebuck & Co., et al.* v. *Solien*, 450 F.2d 333 (CA 8 1971) (No. 71-924; *Solien III*); *Terminal Freight Cooperative Assn., et al.* v. *Solien*, 447 F.2d 1099 (CA 8 1971) (No. 71-925; *Solien IV*).

(Opp., pp. 2, 4). Contrary to such a formulation, however, the fundamental questions presented are whether the General Counsel may permissibly exclude the charging party from meaningful participation in the settlement of notorious unfair labor practice charges, in view of the "party" status which the Act accords to such charging parties, and whether the *procedures* utilized by the Board in its settlement efforts are in fact reviewable. If such procedures are not reviewable, falling within the ambit of the unreviewable discretion conferred on the General Counsel by Section 3(d) of the Act, then there are obviously no further remedies to exhaust.

The Board's formulation of the issues, therefore, has two principal flaws. First, by asking whether "exhaustion" has occurred, instead of whether it is statutorily required or permitted, the Board has assumed the conclusion which it desires the Court to reach. Second, the Board has merged what are really separate questions. There is a difference between the *merits* of a settlement secured by the Board and the *procedures* utilized in this negotiation. The Board's assertion of the reviewability of "settlements" is wholly accurate only to the extent that this refers to the merits of remedial provisions incorporated in the agreement. However, the methods by which such agreements are secured constitute part of the prosecutorial function of the General Counsel and, as such, would fall within the delegation of unreviewable discretion in Section 3(d) which, according to Congress, would "effect a separation of the prosecuting and adjudicating functions within the Board". (*Frito Company* v. *NLRB*, 330 F.2d 458, 462 (CA 9 1964).

Therefore, contrary to the Board's efforts to characterize this case as one involving only the factual question as to whether there has been exhaustion of administrative remedies in a reviewable dispute, the case presents

for this Court's consideration questions concerning the meaning of Section 3(d) of the Act, the reviewability of protested administrative procedures in the attempted settlement of the merits of cases, and the extent to which charging parties before the Board, given their status as "parties" and their vital interests in the proceedings, have a right to an informed participation in the settlement process itself.

B. THE FACTS

In addition to misstating the breadth of the issues presented, the Board's Opposition also misstated various facts. The Board's assertion (at p. 6) that Petitioners did not seek to review the Regional Director's refusal to permit their participation in the settlement process is incorrect. In fact, such protests were made to the Regional Director on July 14, August 12, and again on October 6, 1970. Upon the Director's rejection of these appeals, further review was sought from the General Counsel's office on July 17, 1970 and again on February 18, 1971. These appeals, too, were denied. The matter did not thereafter receive the Board's attention, since on November 22, 1971, the Board determined to defer its consideration of any aspect of the case because the General Counsel had agreed to reconsider his prior approval of the settlement agreement.

For purposes of clarity, however, it must be noted that this reconsideration by the General Counsel relates only to the merits of the settlement, not the procedures which were adopted to achieve it; similarly, the question which had been before the Board, prior to its deferral, related also to the merits of the substantive remedial provisions of that agreement. No decision of the Board has indicated that it would or could assert jurisdiction over the matter of the General Counsel's pre-settlement procedures. The assertion by the General Counsel in this case that the Board would do so is an assumption predi-

cated upon the disputed interpretation of Section 3(d) of the Act. Suffice it to say that review of the Regional Director's pre-settlement conduct was taken at least twice to the General Counsel, constituting, in Petitioners' view of the meaning of the separation of functions effected by 3(d), an exhaustion of the available administrative remedies.[2]

C. THE PARTIES' CONTENTION

In support of the participatory role sought by Petitioners, we have argued that charging parties' right to frame objections to proposed settlement agreements becomes meaningful only to the extent that they possess adequate information to enable them to make an intelligent and knowledgeable evaluation of the terms of that agreement. While some information would normally be available to the aggrieved party in a labor dispute, other pertinent data is uncoverable only by the Board's agents pursuant to their bilateral investigation of the charges filed. A charging party's right to protest a settlement's terms as being inadequate to cure the wrongs committed must, therefore, include the right to be informed about all the collected data which is material to such a judgment—hence, information discovered by the Board's agents which could not otherwise be known to the aggrieved charging parties.

In opposing the charging parties' right to such an informed participation in the resolution of cases involving their vital interests, the General Counsel misstates both what Petitioners sought from the Regional Director in this case and what we believe should be afforded

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[2] The matters now pending before the General Counsel, since they involve the merits of Petitioners' substantive objections to the settlement agreement, are not involved in this case. It should be pointed out, however, that the unresolved posture of this case—and all the *Solien* cases since they arose out of the same labor dispute—lends particular impetus to the need to resolve the important questions presented to this Court for review.

generally. Contrary to the General Counsel's characterizations (at p. 6) that we "demanded" that the Regional Director make available "all evidence relating to the unfair labor practice charges, including the affidavits of prospective Board witnesses . . .", a much narrower request was formulated which gave consideration to the Director's desire to preserve the confidentiality of his files and the identity of prospective witnesses. Indeed, on at least two previous occasions, Petitioners herein presented a formulation of the extent and kind of information required of the Director which varies considerably from the above-described characterization. For example, the following language appears both in Petitioners' brief to the Eighth Circuit in *Solien IV* as well as in the Petition for Writ of Certiorari in *Solien IV* (No. 71-925):

> "Such a requirement does not presuppose an effort to discover inter-agency memoranda or other internal deliberations nor to examine the affidavits of any prospective witnesses nor even to be informed as to the identity of any such witnesses. Rather, the information which is needed to make the right to object meaningful consists only of (i) the evidentiary facts uncovered by the Director's investigation which support his belief that the law was violated, many of which facts could not otherwise be known by charging parties; (ii) those facts which were alleged by the charging parties which the Director does not believe to be true or relevant or verifiable; (iii) the theories upon which the Director proceeds; (iv) the relief which the Director seeks, as well as his reasons for refusing to seek other relief which the charging parties may have urged."

Fundamentally, the Director and the General Counsel seem to take the view that the method by which settlements are negotiated, both with respect to providing information to the charging parties and permitting them

to participate in the deliberations, is within the agency's discretion; that this question includes the right to provide no information and exclude charging parties' participation in negotiations, permitting them only to file objections to the settlement agreement ultimately negotiated between the Director and the respondent. The charging parties may then, if they are displeased with the agreement, seek review in the courts.

This construct contains several major deficiencies. *First*, there is the question, discussed *supra*, as to whether the General Counsel's pre-settlement procedural decisions are reviewable at all under Section 3(d). *Second*, the lack of all material facts bearing on the merits of the settlement would prevent charging parties from framing adequate objections or knowing precisely what issues to frame for the courts on review or what relief would be appropriate given those facts. *Third*, since the interests of the Board and the charging parties are not identical (see, *e.g.*, *U.A.W.* v. *Scofield*, 382 U.S. 205), the exclusion of charging parties from settlement negotiations is inherently unlikely to produce a result satisfactory to their needs. Nor is it compatible with charging parties' status as aggrieved "parties" before the agency to diminish their role so as to render them only the beneficiaries of others' deliberations rather than active and vitally interested participants on their own behalf. *Fourth*, there is a substantial question as to the extent to which meaningful review is available to charging parties even on the merits of the settlement agreement itself. For example, according to *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (CA 3 1966), charging parties are entitled to a full evidentiary hearing on their objections to settlements. However, in *Concrete Materials of Georgia, Inc.* v. *NLRB*, —— F.2d ——, 76 LRRM 2832 (CA 5 1971), the right to such a hearing is limited only to objections raising "material issues of

disputed fact".[3] But in *Local 282 I.B.T.* v. *NLRB*, 339 F.2d 795 (CA 2 1964) it was held that charging parties are not entitled to any evidentiary hearing on their objections to the General Counsel's approval of a settlement agreement. Under such circumstances, denial to charging parties of an active participatory role in the settlement negotiations may result in the effective denial of a voice in the outcome of their meritorious charges. *Fifth*, where judicial review of the General Counsel's decision is sought, the question before the court would presumably be whether the settlement is reasonable. Since a number of alternative settlements may all be judicially sustainable despite varying considerably in their desirability to charging parties, failure to permit those charging parties to participate in the negotiation process leading to the selection of one of those alternatives may needlessly prevent them from achieving the most desirable and effective result. And *sixth*, statistical research has revealed that charging parties before the Board have no reason to be sanguine as to the likelihood of favorable consideration of their objections to settlements by the General Counsel—whether the settlements are formal or informal. (See, Footnote 19, p. 13 of Petition for Writ of Certiorari herein). That fact, together with a denial of an evidentiary hearing on the objections and the limited value of judicial review in these cases, again argues persuasively for permitting charging parties the greatest opportunity for informed involvement in the negotiation and selection of settlement agreements in their cases.

Finally, Petitioners wish to direct the Court's attention to an inconsistency in the General Counsel's approach to the question of the reviewability of his deci-

[3] Absent the right to all material facts, including those secured by the Director's investigation, but unknown to the charging parties, it is difficult to see how this qualified right of review could be utilized effectively by the charging parties.

sions in cases involving his approval of unilateral settlement agreements. In this case he argues that his "prosecutorial" conduct, *i.e.*, the procedure he follows in securing settlement agreements, is reviewable before the Board and the courts despite the proscriptions of Section 3(d). Yet, in another case now pending in the Third Circuit, *Terminal Freight Cooperative Association, et al.* v. *NLRB* (CA 3, No. 18,948), the General Counsel argues that the *substantive terms* of a settlement agreement which he approved may *not* be reviewed because such approval was part of the prosecutorial function reserved to his discretion under 3(d). Although the cases differ, insofar as here the General Counsel issued an administrative complaint prior to settlement, while in the Third Circuit case he had not, that distinction would appear to have nothing to do with the question as to whether certain specific conduct represents a "prosecutorial" function.

The effective administration of the National Labor Relations Act and these and all other charging parties before the Board require judicial guidelines as to the

meaning of Section 3(d) as well as the resolution of the related questions prsented here.

Respectfully submitted,

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